

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Clifford A. Lowe, Case No. 1:19-cv-0748-JG
Cleveland, Ohio
Plaintiff, Monday, August 15, 2022
8:30 a.m.
vs.

Shield Mark, Inc.,
et al.,

Defendants.

TRANSCRIPT OF ORAL ARGUMENTS ON MOTIONS PROCEEDINGS
HELD VIA VIDEO CONFERENCE
BEFORE THE HONORABLE JAMES S. GWIN,
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

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1 MORNING SESSION, MONDAY, AUGUST 15, 2022 8:30 A.M.

2 THE COURT: We're here on 19-cv-748, Lowe
3 versus ShieldMark. We're here today for a hearing on a
4 couple of motions filed by the defendant.

08:46:09 5 The defendant has filed a motion saying that plaintiff
6 lacks standing. Separate, the defendant had earlier filed a
7 motion arguing that the '664 patent involved with this case
8 was invalid as having failed to make a sufficient disclosure
9 and arguing that the '664 had been anticipated or in use in
08:46:45 10 prior materials.

11 The plaintiff has filed these -- or the defendant has
12 filed these motions, so we'll allow the -- and my thinking
13 would be to separate the two arguments. First deal with the
14 standing argument since standing is an issue probably a
08:47:09 15 cornerstone for this litigation, and then separately to deal
16 with the invalidity issue.

17 So on behalf of the plaintiff, who wants to begin by
18 making argument to with regard to the standing issue? And I
19 advise the parties, I've been through I believe all of the
08:47:36 20 materials. I don't need kind of a summary of that.

21 But for the defendant, who has been designated to make
22 the standing argument?

23 MR. SHEIKH: Yes, Your Honor. This is Dave
24 Sheikh, and I will be handling the argument today.

08:47:55 25 THE COURT: Okay. So if it's transferred from

1 Lowe to North Carolina and then within weeks of that a non-
2 -- a license to nonexclusive license given to I will refer
3 to it as Delaware. So is it your argument that Lowe's has
4 no standing to remain in the case?

08:48:30 5 MR. SHEIKH: Yes, Your Honor. Our position is
6 that none of the plaintiffs in the case thereto now --

7 THE COURT: Let's start off with Lowe. Lowe
8 has transferred all his property interest in the patent,
9 right?

08:48:43 10 MR. SHEIKH: Correct, Your Honor, and that's a
11 good place to start, because that is crystal clear.
12 Mr. Lowe through an assignment transferred in December 2021
13 absolutely everything, all right, title, and interest into
14 this patent to InSite North Carolina.

08:49:06 15 I will refer, there are two InSite entities, there's
16 North Carolina and Delaware. For shorthand I'll refer to it
17 as North Carolina.

18 He transferred everything to North Carolina. So as
19 far as Mr. Lowe --

08:49:18 20 THE COURT: Including -- did he also transfer
21 this lawsuit as part of that?

22 MR. SHEIKH: Yes. Yes, Your Honor. The
23 assignment to North Carolina was an assignment of the right
24 to pursue and recover -- pursue infringement for past
08:49:37 25 damages and to recover damages for past infringement. The

1 only thing -- so with respect to the patent, he has nothing.
2 All that Mr. Lowe has and all this -- they're conceding,
3 this is a hunting license, meaning that he has the right to
4 deal with this lawsuit.

08:50:04 5 THE COURT: What's your position as to
6 whether -- does he have any personally-owned exclusionary
7 rights after the transfer?

8 MR. SHEIKH: Absolutely not. He has nothing,
9 Your Honor. Mr. Lowe has nothing. He transferred the
08:50:21 10 entire right, title, and interest, including any
11 exclusionary rights, to North Carolina. That is absolutely
12 clear, and I think the plaintiffs are conceding that.

13 THE COURT: Okay. So in your take of the
14 controlling law, either the *Microsoft* case or the *Mann* case,
08:50:49 15 is the exclusionary right a prerequisite to standing?

16 MR. SHEIKH: Yes, that's correct, Your Honor.
17 Those cases, as well as Supreme Court cases that precede it
18 by many years, made clear that the exclusionary right,
19 because a patent is by definition the right --

08:51:09 20 THE COURT: Who was the author of the -- who
21 was the brilliant Ohio citizen who was the author of the
22 lead Supreme Court case?

23 MR. SHEIKH: Well --

24 THE COURT: I'll give you a hint. He was also
08:51:24 25 a president.

1 MR. SHEIKH: Yes. That would be Taft, Chief
2 Justice Taft, I believe, Your Honor -- who I know is from
3 Ohio and was not only Chief Justice, but President of the
4 United States -- authored that opinion. And that --

08:51:43 5 THE COURT: So you're saying that if you don't
6 have exclusionary rights you lack standing.

7 What's your version of if you at one time had
8 exclusionary rights and give them up, do you have a right to
9 either proceed with litigation or regard the former right as
08:52:10 10 the chosen action that you're allowed to carry on?

11 MR. SHEIKH: So the answer to that is with
12 standing in a patent infringement suit, it has to exist at
13 all times during the case. So you can do things, and this
14 is what a lot of these cases deal with it. In fact we
08:52:27 15 provided you with the *Unilock* case, which is analogous, and
16 the *Cytologics* case, which we cited as supplemental
17 authority. It's got to exist at all times during the case.

18 So you can do things to destroy standing, and through
19 this transaction which was really never disclosed to us, we
08:52:45 20 found out late, that is what's happened. They've lost that.
21 You cannot -- as a matter of law you cannot maintain a
22 lawsuit where you have merely a hunting license.

23 I use that term --

24 THE COURT: Let's shift gears on the standing
08:53:04 25 issue.

1 Does North Carolina have standing? They were a
2 plaintiff in the case. Do they continue to have standing
3 after the Lowe-North Carolina transaction and, perhaps more
4 importantly, after the North Carolina-Delaware transaction?

08:53:26 5 MR. SHEIKH: So the answer to that, Your
6 Honor, is no, and those two transactions took place close in
7 time. So you have the assignment --

8 THE COURT: Did North Carolina keep any rights
9 to -- well, did North Carolina, wasn't it an exclusive
08:53:46 10 license given to Delaware?

11 MR. SHEIKH: No, a nonexclusive license was
12 given to Delaware --

13 THE COURT: Did the license give Delaware the
14 right to sublicense?

08:53:59 15 MR. SHEIKH: Correct. And that's very
16 important --

17 THE COURT: Was there any restrictions on who
18 Delaware could sublicense to?

19 MR. SHEIKH: No, Your Honor.

08:54:09 20 THE COURT: Was there any right for North
21 Carolina to recover the patent if there was some breach by
22 Delaware of the agreement?

23 MR. SHEIKH: Not that -- not in the four
24 corners of the agreement, which I want to point out one
08:54:27 25 thing.

1 We all ought to keep in mind there is an integration
2 clause in the agreement, so really the answers to all of
3 these questions must be found in the agreement, not in any
4 separate discussions.

08:54:38 5 And the answer to your question, Your Honor, is I am
6 not aware of anything in this agreement that would allow
7 that. What happened in this transaction was the sale of a
8 business. The business --

9 THE COURT: Did Delaware -- did North
08:54:53 10 Carolina-to-Delaware have any termination date?

11 MR. SHEIKH: Delaware -- I'm sorry --

12 THE COURT: North Carolina to Delaware
13 license, did it have any termination date?

14 MR. SHEIKH: No --

08:55:08 15 THE COURT: Other than the option to purchase
16 the rest of North Carolina's interest.

17 MR. SHEIKH: No, Your Honor. The license,
18 which is granted in 2.1, grants a nonexclusive license fully
19 sublicensable royalty free, perpetual, irrevocable,
08:55:32 20 nonterminable. That's what it says. So with the rights
21 to --

22 THE COURT: Were there -- was the North
23 Carolina-to-Delaware license paid up or was there any right
24 for North Carolina to receive future royalties?

08:55:52 25 MR. SHEIKH: No, Your Honor. Well, it's fully

1 paid up. The 2.1 says it's royalty free, fully paid up.

2 So at my reading of this agreement, I think it's
3 really the only reading, reasonable reading, was that the
4 consideration was the sale of the business; that all the
08:56:11 5 assets -- what was done here was Mr. Lowe was getting out of
6 the business, and so as part of that he gave everything
7 over, including a fully-paid-up perpetual license with the
8 right to sublicense to the entity that was going to stay in
9 the business, that was going to be in the business, which is
08:56:31 10 Delaware.

11 He's no longer in the business, so he kept nothing.
12 North Carolina is no longer in the business, they kept
13 nothing except a hunting license. The hunting license is to
14 hunt -- to recover damages only up until December 15, 2021.
08:56:47 15 That's important, too; nothing past December 15, 2021.

16 They had a chosen action. They can purport to pursue
17 this case only to sue ShieldMark to recover damages up to
18 that point. There's no right to exclude, no right to
19 license, no right to practice the patent themselves.

08:57:09 20 Delaware can grant sublicenses without any consent,
21 you know, no right to seek any injunction. They have said
22 repeatedly in this case, and their expert report that they
23 submitted confirms this, they are not seeking anything in
24 the case, nor do they have the right to, except a cause of
08:57:28 25 action for damages up to December 15, 2021. After that

1 point, who knows. And of course, we're eight months into
2 that, and nobody has the right to exclude ShieldMark from
3 doing anything at all.

4 THE COURT: So does Delaware have any right to
08:57:51 5 exclude ShieldMark?

6 MR. SHEIKH: No.

7 THE COURT: It's a nonexclusive licensing.

8 MR. SHEIKH: Correct. Right now, the
9 situation is they have a nonexclusive license with the right
08:58:02 10 to sublicense. They could sublicense ShieldMark; any
11 defendants in the case, they can sublicense anyone. They
12 have an option that may or may not be exercised under which
13 they can acquire the patent, okay, from North Carolina.
14 They can --

08:58:24 15 THE COURT: And do they have to pay anything
16 to exercise that option?

17 MR. SHEIKH: Not by the terms of this
18 agreement, Your Honor. I believe the agreement, again, the
19 only reasonable reading of this agreement, would be that
08:58:37 20 that consideration has already been paid and that option is
21 part of the original consideration, and if they exercise
22 that option there's no further consideration.

23 THE COURT: Okay. Let me shift to just kind
24 of a different path to this.

08:58:56 25 You additionally make a motion or seek sanctions in

1 this case. Were you advised at any time of the sublicense
2 to Delaware before coming upon the North Carolina
3 registration with the Patent and Trademark Office?

4 MR. SHEIKH: The answer to that question is
08:59:17 5 absolutely not, and even let me clarify. We became aware on
6 our own of a recorded assignment from Mr. Lowe to North
7 Carolina. That recorded assignment, it was recorded on or
8 around in December 2021, we became aware of it much later.

9 That recorded assignment says nothing in it about
08:59:47 10 Delaware. So the existence of that entity and their role
11 and any rights that might have been given by North
12 Carolina-Delaware, that has nothing to do with it.

13 So that was only the tip of the iceberg. So we became
14 aware of that and that, as Your Honor started here,
09:00:07 15 unequivocally showed that Mr. Lowe has no standing to be in
16 the suit because he assigned --

17 THE COURT: Let me go on to the sanctions
18 issue. The Lowe to North Carolina, was it dated December
19 9th?

09:00:27 20 MR. SHEIKH: Correct, Your Honor. That is the
21 assignment from Lowe to North Carolina, December 9, 2021.

22 THE COURT: Was there any filings to the U.S.
23 District Court that somebody else may have an interest in
24 this litigation?

09:00:43 25 MR. SHEIKH: No. Well, not until we --

1 THE COURT: That Delaware might have an
2 interest in this litigation? Did the plaintiffs file a
3 notice that another party might have an interest in this
4 litigation?

09:00:58 5 MR. SHEIKH: Absolutely not, and that is
6 troubling, was troubling to us, and kind of goes to the
7 heart of the problem.

8 The answer is no, that did not happen, and that still
9 has not happened, frankly.

09:01:11 10 THE COURT: Did plaintiff or appellant in this
11 Federal Circuit case, were you required to make a filing
12 that parties had an interest in the litigation?

13 MR. SHEIKH: Yes.

14 THE COURT: Does that have an obligation to be
09:01:32 15 supplemental if the situation changes?

16 MR. SHEIKH: I believe so, yes, Your Honor.

17 THE COURT: Did plaintiffs notify the circuit
18 court sometime near December 9 or December 13 that another
19 party may have an interest in the Federal Circuit
09:01:50 20 litigation?

21 MR. SHEIKH: No, Your Honor, that was never
22 done, to my knowledge. There's no filing or --

23 THE COURT: At argument did they ever orally
24 advise the circuit court that they'd given a license to
09:02:09 25 somebody together with an option to purchase North Carolina?

1 MR. SHEIKH: No, Your Honor.

2 THE COURT: And so what damages do you contend
3 you suffered as a result of the failure to supplement
4 discovery in this case?

09:02:25 5 MR. SHEIKH: So following -- well, first of
6 all, I think if the issue, this issue would have come up in
7 a timely fashion, it could have been raised at the Federal
8 Circuit and could have provided a basis for dismissal of the
9 lawsuit at that point, Your Honor, so that's number one.

09:02:41 10 So everything that's been done from that point forward
11 I think is unnecessary unfair prejudice and expenses to us,
12 because as we said in these filings, there was -- as of the
13 date of that transaction there's been no standing, no
14 subject matter jurisdiction. The case should have been
09:03:01 15 dismissed.

16 Now we come to remand. Your Honor sensibly convened
17 the parties and set forth a process by which we could deal
18 with the substantive issues in the case, including
19 invalidity of the patent, that included supplemental
09:03:15 20 briefing and additional discovery.

21 We have had to incur all of that expense,
22 inconvenience, and prejudice in disclosing, Your Honor, our
23 confidential sales information past December 15, 2021, which
24 was exposed publicly. That's the subject of another motion.

09:03:36 25 But we have had to do all of that. We have had to

1 deal with the substantive issues of invalidity, whereas as
2 of December 15, 2021 this case should have been dismissed.
3 No subject matter jurisdiction, case over. Mr. Lowe sold
4 his business, there's a transaction depriving him of
09:03:55 5 standing.

6 So everything that's happened since that date has been
7 unfair prejudice to the defendants. Everything. This case
8 should have been over.

9 THE COURT: Let's afford the plaintiff an
09:04:07 10 opportunity to respond on the standing and sanctions issue.

11 Let's go to the standing issue first. Are you still
12 contending that Lowe has got some standing?

13 MR. WEBER: Yes, Your Honor.

14 THE COURT: How do you get around *Microsoft*
09:04:24 15 case?

16 So *Microsoft* case, they went into bankruptcy, right?

17 MR. WEBER: Right.

18 THE COURT: And in the bankruptcy plan they
19 divided up the debtors' interest in three piles: A
09:04:45 20 bondholders pile, a nonsecured creditors pile, and basically
21 af administrator pile; right?

22 MR. WEBER: Yes.

23 THE COURT: And the administrator kept the
24 patent, right?

09:04:59 25 MR. WEBER: I believe so, yes.

1 THE COURT: And then the same thing, the
2 unsecured creditors received the right to sue for any past
3 infringement, correct?

4 MR. WEBER: I believe that's correct.

09:05:15 5 THE COURT: And didn't the Federal Circuit say
6 that that was insufficient to give them standing because the
7 administrator had the right to -- they didn't have
8 exclusivity in the case?

9 MR. WEBER: Yes, but that's not the situation
09:05:37 10 here.

11 THE COURT: How is this different?

12 MR. WEBER: Well, this is different because,
13 first of all, the parties have never changed in this case.
14 There is no administrator, there are no debtors, there is
09:05:52 15 none of that.

16 You had from the -- at the time of the transfer of the
17 patent from Lowe to North Carolina there was a
18 contemporaneous assignment back from North Carolina to Lowe.
19 All they did was changed positions. They were both
09:06:19 20 plaintiffs, they both remained plaintiffs.

21 The title of the patent was still whole, it was still
22 held by the plaintiffs, and Lowe retained the right to
23 enforce the patent along with the patent owner.

24 THE COURT: Let me take you to *the Microsoft*
09:06:39 25 case, because the grant in that case I thought had been

1 given to the unsecured creditors to pursue any past patent
2 infringement.

3 So how is this current circumstance different than
4 when North Carolina has the legal title to the patent and
09:07:08 5 gives to Lowe a right to continue the patent litigation even
6 though Lowe does not have any exclusionary rights?

7 MR. WEBER: Well, Lowe did have exclusionary
8 rights --

9 THE COURT: Well, how did he have exclusionary
09:07:26 10 rights after the North Carolina transaction?

11 MR. WEBER: After the North Carolina
12 transaction there was a license back to Lowe. The license
13 was --

14 THE COURT: Are you saying you can license or
09:07:42 15 you can transfer a chosen action for patent infringement?
16 Is that the argument?

17 MR. WEBER: The lawsuit itself would have been
18 an asset of the company. That lawsuit was carved out of the
19 transaction. The patent was carved out of the transaction.

09:08:07 20 Those two were negotiated, and it's acknowledged, it's
21 acknowledged by Delaware, that that's carved out. So
22 Delaware could not have ever transferred to anyone else or
23 themselves the taking on of this litigation.

24 The litigation was an asset, the litigation as a
09:08:30 25 matter of fact reduced the price that was paid or the price

1 that was received for the company --

2 THE COURT: Do you have in front of you Lowe's
3 assignment to North Carolina? Take a look at the actual
4 document you've just characterized.

09:08:57 5 MR. WEBER: I do not have it in front of me,
6 but I'll --

7 THE COURT: It is document 169-1. Let me help
8 try to read -- this is Lowe's assignment to North Carolina,
9 full paragraph -- not the last, but the second-to-last
09:09:22 10 paragraph on the first page reads, "Assignor," which means
11 Lowe, "hereby acknowledges that this assignment, being of
12 assignor's entire right, title, and interest in and to the
13 invention and patent rights carries with it the right in
14 assigning to apply to" -- "for all competent authorities and
09:09:49 15 the right to procure" -- (pause.)

16 And perhaps I'm pointing to the wrong thing.

17 New paragraph. "Assignor does hereby sell, assign,
18 convey, transfer unto assignee and its successors assigned
19 as legal representative the entire right, title, and
09:10:31 20 interest in and throughout the world to the inventions, and
21 including together with assignor's entire right, title, and
22 interest in and to the patent rights."

23 So isn't that about as blanket an assignment as
24 possible?

09:10:55 25 MR. WEBER: Sure, that's a forum assignment,

1 and at the same time contemporaneously North Carolina
2 granted a license back to Lowe.

3 THE COURT: How can -- if they granted a
4 license back to Lowe, wouldn't Lowe have had to have a
09:11:27 5 substantial interest in the patent to be able to carry it
6 out? And at the time he was transferred had he given up the
7 right to sublicense?

8 MR. WEBER: Did Lowe give up the right to
9 sublicense?

09:11:47 10 THE COURT: Yeah. Did Lowe give up the right
11 to sublicense?

12 MR. WEBER: To sublicense his license --

13 THE COURT: No, to sublicense the patent.

14 MR. WEBER: I mean -- oh, okay, sublicense the
09:12:03 15 patent.

16 No, I don't believe that he would have had the right
17 to sublicense the patent. The whole --

18 THE COURT: Did he have any right to recover
19 the patent?

09:12:15 20 MR. WEBER: The right to recover the patent;
21 no, I don't believe so. He was a licensee.

22 THE COURT: Did he have any -- did he have any
23 right to control North Carolina's activities with the
24 patent?

09:12:29 25 MR. WEBER: To the extent that he's an owner

1 of North Carolina, I would assume that he did. I don't know
2 that it's necessarily pursuant to any agreement, but he's a
3 principal of North Carolina.

4 The whole thrust here, Your Honor, is that Mr. Lowe,
09:12:59 5 it was not a sale of his business, it was an asset sale to
6 facilitate the sale of the assets. The -- Lowe, who always
7 owned all of the patents, seven patents or whatever, he was
8 the inventor, he owned them, he transferred them to InSite
9 North Carolina.

09:13:22 10 InSite North Carolina then assigned all but the '664
11 patent to InSite Delaware. InSite North Carolina at the
12 same time licensed back Lowe.

13 All the two plaintiffs did was change position. You
14 still had the owner of the patent and you still had a
09:13:49 15 licensee of the patent and you still had a lawsuit, and all
16 three of those were treated in the transaction in the right
17 to continue the lawsuit. Nothing changed. I mean the
18 parties were the same --

19 THE COURT: Let me go to that, because you've
09:14:09 20 got the Lowe to the separate corporate North Carolina
21 entity, right?

22 MR. WEBER: To the -- right, yeah, to his LLC.

23 THE COURT: And then the other agreements
24 between the North Carolina entity and the Delaware entity,
09:14:24 25 right?

1 MR. WEBER: Yes, which I'll acknowledge --

2 THE COURT: Is he a party to the North

3 Carolina to Delaware entity agreement?

4 MR. WEBER: I'm sorry, Your Honor --

09:14:39 5 THE COURT: Was he named as one of the people

6 obtaining an interest in the patent in the North

7 Carolina-to-Delaware agreement?

8 MR. WEBER: Yes, he was going to continue the

9 litigation. That's an exclusionary right.

09:14:57 10 MR. SHEIKH: Your Honor --

11 THE COURT: How could North Carolina have

12 given him exclusionary right if they don't make the direct

13 grant to him?

14 MR. WEBER: Licenses do not have to be in

09:15:15 15 writing. There's all kinds of case law on that.

16 The whole intent recognized by everyone except the

17 defendants herein was he had an opportunity to sell his

18 assets. He sold his assets.

19 He took less for his assets than what he normally

09:15:37 20 would have gotten, and for that he reserved the right to

21 continue the litigation. That was just an interchange in

22 the positions of the patent owner and the licensee. Before

23 InSite North Carolina had been the licensee and Lowe owned

24 the patent; then those two positions changed.

09:16:04 25 That's all that changed; standing didn't change.

1 THE COURT: Well, do licensees always have a
2 right to bring infringement actions under your version?

3 MR. WEBER: Do licensees always have a right?
4 No.

09:16:22 5 THE COURT: And what's the requirement before
6 they have standing to bring an infringement action?

7 MR. WEBER: They have to typically bring in
8 the patentee.

9 THE COURT: Well, they typically do, but it's
09:16:37 10 not -- actually you're wrong about that. It's not the
11 patentee, it's bringing in the current owner.

12 MR. WEBER: Well, the patentee is defined by
13 statute and those terms are interchanged, but technically
14 I'll accept what you're saying, Your Honor, the patent
09:16:57 15 owner. So you join the patent owner.

16 THE COURT: But in either the patent owner or
17 the patentee, don't they also need to retain a substantial
18 interest in the patent that basically gives them the right
19 to exclude third or fourth or fifth parties from exercising
09:17:22 20 the patented product?

21 MR. WEBER: Well, that's inherent with a
22 patent.

23 Maybe I didn't understand your question. That's
24 inherent to the patent owner has that right.

09:17:35 25 THE COURT: Okay. Well, it's also a

1 prerequisite, right?

2 MR. WEBER: Yes, I would think.

3 THE COURT: Isn't that what Justice Taft,
4 Chief Justice Taft held in the, I believe in the 1920 case?

09:17:51 5 MR. WEBER: I believe so, and I'll accept your
6 word on that.

7 THE COURT: How different would that case be
8 from this case?

9 MR. WEBER: It was a nonexclusive license to
09:18:06 10 Delaware, for one thing, nonexclusive license to Delaware.
11 The suit was already ongoing.

12 THE COURT: Well, nonexclusive license to
13 Delaware means that Delaware itself can't bring a claim,
14 right?

09:18:28 15 MR. WEBER: Well, that's correct here, because
16 they took subject to the prior license. Delaware
17 acknowledged --

18 THE COURT: If your colleague wants to make
19 the argument have her make the argument. Don't have her
09:18:44 20 sitting there kind of making the argument for you by
21 parroting it through you.

22 So if she wants to make the argument, she's the one in
23 charge of this and knows the case better, have her make the
24 argument. So I'm not going to listen to two people making
09:19:00 25 the argument, so one or the other, you make the argument.

1 But if she's not making the argument, then you sit
2 back and let her make the argument.

3 MR. WEBER: All right, I will.

4 MS. GENTILCORE: With your permission, Your
09:19:14 5 Honor.

6 The difference is it was a nonexclusive license. In
7 the other case, they did not give enough to Delaware that
8 Delaware -- Delaware took, subject to the existing ownership
9 of North Carolina and the existing license to North Carolina
09:19:36 10 to Lowe, they take --

11 THE COURT: That's true in all these cases,
12 isn't it? That was true in the -- that was true in *the*
13 *Microsoft* case, right?

14 MS. GENTILCORE: It's true to the extent that
09:19:48 15 they look at them to see what was retained. And in that
16 case, in those cases, all of the rights were given over.

17 In this case, all of the rights were not given over.
18 It was a nonexclusive license.

19 THE COURT: Who had the right to sublicense?

09:20:07 20 MS. GENTILCORE: Who has a right to sublicense
21 now?

22 THE COURT: Yes.

23 MS. GENTILCORE: I believe it is Delaware, but
24 only to the extent that --

09:20:20 25 THE COURT: Okay. Is there any conditions in

1 the contract with Delaware restricting who Delaware can
2 sublicense to?

3 MS. GENTILCORE: There is a restriction,
4 because they cannot -- it's not to whom they can, it's a
09:20:34 5 restriction of what they can.

6 They cannot give -- North Carolina did not give more
7 to Delaware than it has -- or Delaware took subject to North
8 Carolina's continuing right, continuing right to make, use,
9 and sell. They didn't give those up. It's a nonexclusive
09:20:55 10 right. It's a nonexclusive license. They didn't give those
11 up.

12 They are co with Delaware. North Carolina can make,
13 use, sell, and offer for sale. They did not give those
14 rights up because it was a nonexclusive license.

09:21:10 15 And what happened in the license agreement with
16 Delaware is they acknowledged only one thing. They
17 acknowledged that when it comes to the right to pursue the
18 litigation, Lowe shares that right with North Carolina.
19 North Carolina did not give up that right.

09:21:31 20 THE COURT: Okay. Does the defendant have any
21 response? And then I'm going to move on.

22 MR. SHEIKH: I do, Your Honor. I want to make
23 a few points, because I've heard a few things that simply
24 aren't true.

09:21:42 25 First of all, you hit the nail on the head, Your

1 Honor. You went right to the assignment, and the
2 assignment, in the assignment, they/Lowe assigned all causes
3 of action. All causes of action, everything assigned.
4 That's number one.

09:22:03 5 Number two, there's some suggestion here that Mr. Lowe
6 has a license-back, a license. He doesn't have a license,
7 he has nothing. There's no document here. And again, the
8 North Carolina-Delaware transaction, Mr. Lowe was not a
9 party to that. He was not a party to that. He assigned in
09:22:25 10 a publicly-filed document all rights and kept nothing.

11 Third, Your Honor, I think something is being missed
12 here, is that in this case how is Your Honor, in this
13 rhetorical question, how is Your Honor going to enter a
14 final judgment. It can't be done because they have
09:22:49 15 conceded, they have said that their rights in this case are
16 limited to damages that accrued only up until December 15,
17 2021. The patent doesn't expire until April 2026. Their
18 rights stop.

19 We're now eight months past what they are seeking in
09:23:08 20 this lawsuit. ShieldMark, the defendants, they are
21 continuing to practice, to sell the invention. And so there
22 is -- there's no way a final judgment can be entered here
23 and the Federal Circuit has recognized a policy on this,
24 that you can't separate the right to a cause of action from
09:23:28 25 the right to exclude for this reason: We face untold,

1 unidentified additional lawsuits, exposure, claims, because
2 of this.

3 I also mentioned, and the Supreme Court case by Chief
4 Justice Taft is directly relevant here, of course it's a
09:23:49 5 Supreme Court case; our case is even stronger for no
6 standing because of the fact that they have said that their
7 rights under this patent against us -- and that's all that
8 matters, it's us -- only extend to the right to pursue
9 damages to December 15, 2021.

09:24:12 10 So in that regards, even stronger because here we have
11 an additional patent term left, and they're saying, well, we
12 don't have rights there to exclude you from doing that. In
13 fact, I don't even know who has the rights to do that,
14 nobody does.

09:24:29 15 So you can't enter final judgment here in this case,
16 there's no standing. Your Honor has gone right to the heart
17 of it by asking the questions you did of plaintiffs, which
18 you know, again, the answers I think confirmed it. There's
19 no standing here, Your Honor, there's no right to exclude.
09:24:46 20 They separated the right to exclude, which is essential to
21 the patent, from a cause of action for damages.

22 The Supreme Court --

23 THE COURT: In this case, with the
24 nonexclusive to Delaware, does anybody have the right to
09:25:03 25 exclude?

1 MR. SHEIKH: That's exactly right, Your Honor.
2 The answer to that question is, no. They only have an
3 option, so I don't think there is the right to exclude.

4 I will say this, also. The plaintiffs keep pointing
09:25:18 5 to the fact that it was a nonexclusive license given and
6 latching onto that, but the Court has repeatedly said you
7 don't look at the title or labels applied to these rights.
8 You've got to look at the substance. You've got to look at
9 what actually happened here.

09:25:35 10 And when you look at what actually happened here, I
11 don't care what they call it, it doesn't matter. What
12 actually happened here is that they -- all substantial
13 rights, all exclusionary rights are gone from the plaintiffs
14 in this case. Where they are, we can't say, Your Honor.
09:25:52 15 You're making a good point. We can't say.

16 So because of that, we can't have a final judgment in
17 this case, and there's just no right to pursue this case.
18 It ended on December 15, 2021, Your Honor.

19 THE COURT: All right. Let's turn to the
09:26:11 20 invalidity. There's basically two somewhat distinct
21 arguments on the invalidity. One is that the
22 specifications, that the plaintiff had not sufficiently --
23 under the plaintiff's version they had not given specific
24 information to embody the patented invention, and I to some
09:26:47 25 degree understand the plaintiff -- or the defendant to make

1 the argument that the specifications are intended to both
2 enable a third party skilled in the art to create the
3 patented article, but also that the specifications can place
4 some limits on the scope of a claim if the scope of the
09:27:17 5 claim exceeds the specification.

6 Is that generally your embodiment argument?

7 MR. SHEIKH: Yes, Your Honor. You have the
8 written description requirements of Section 112 and the
9 enablement requirement.

09:27:33 10 Our argument focuses on primarily on the written
11 description requirement, which requires correspondence
12 between the specification and the claims, correct.

13 THE COURT: The second argument you make is
14 that if accepted under the Federal Circuit's claim
09:27:49 15 construction. That the earlier art together with I believe
16 the Dorenbusch patent disclosed or anticipated the patent in
17 this case. Do you want to make -- why don't you begin with
18 disclosure requirement in the specifications argument, and
19 then follow that with whatever argument you want to make on
09:28:24 20 the Dorenbusch or the Durastripe.

21 MR. SHEIKH: Yes, Your Honor. Thank you.

22 I will start with the written description requirement,
23 that's 35 U.S.C. Section 112. And as I mentioned, it
24 requires a correspondence between the scope and content of
09:28:45 25 the written description, including what's written in the

1 drawings and the claims. And that correspondence requires
2 that the scope, the meaning and scope of the claims, cannot
3 be inconsistent with or broader than the scope and content
4 of the specification.

09:29:03 5 THE COURT: On this argument, do you likely
6 lose with regard to the shoulders, given the Federal
7 Circuit's opinion?

8 MR. SHEIKH: Yes, Your Honor. The Federal
9 Circuit --

09:29:18 10 THE COURT: So on this specifications, is that
11 principally related to the underside of the tape?

12 MR. SHEIKH: Correct, Your Honor. The Federal
13 Circuit, the issue before the Federal Circuit, and you've
14 got to remember this was an appeal from a stipulated
09:29:37 15 judgment of noninfringement based on Your Honor's claim
16 construction, and that with respect to what you just asked
17 about the issue was we had argued to the Court and the Court
18 agreed that several claim terms required the presence of
19 shoulders on the bottom. And that was our claim
09:30:04 20 construction, the use of the word "shoulders."

21 That was appealed to the Federal Circuit and the
22 Federal Circuit disagreed. The Federal Circuit held that
23 the claims as properly construed did not require shoulders.
24 That's what was decided. And for that reason, the judgment
09:30:24 25 of noninfringement was vacated and the case was remanded.

1 THE COURT: Did they make any ruling on the
2 underside as to whether the patent claims sufficiently
3 disclosed an underside able to hold the adhesive?

4 MR. SHEIKH: No, Your Honor, they didn't. In
09:30:47 5 fact, and that goes back to what was actually before the
6 Federal Circuit, it was a stipulated judgment of
7 noninfringement.

8 And so the issue of validity, which is Section 35,
9 U.S.C., Section 112, the written description requirement,
09:30:59 10 that issue of validity was not before the Court. In fact,
11 that issue was dismissed without prejudice before the
12 appeal.

13 So the Federal Circuit did not consider, much less
14 rule on, whether the scope and content of the written
09:31:18 15 description would support to one skilled in the art a scope,
16 a claim scope that has no structure, nothing on the bottom,
17 flat. That was not determined.

18 And so on remand, now, you know, we said, we had said
19 as Your Honor will remember, virtually from the beginning of
09:31:38 20 the case, that the plaintiffs can't have it both ways. That
21 if they're going to apply these claims to a product that's
22 got a flat bottom that it's maybe those claims would cover
23 the accused product, you know, they could make that
24 argument; but you have to look at the other side of the
09:32:00 25 coin. That would render them invalid because of the written

1 description requirement.

2 We said that from the beginning of the case. That
3 came to fruition when the Federal Circuit made its decision.
4 The Federal Circuit went with, they agreed with the
09:32:16 5 plaintiffs, they adopted their position on this claim scope
6 that it would encompass a flat bottom. They got what they
7 wanted.

8 Now it's back before Your Honor. We're going back to
9 what we said in the beginning of the case. They got what
09:32:29 10 they wanted, but here, let's look at the other side of the
11 coin. They don't like the other side of the coin. They
12 don't want you to look at the other side of the coin.
13 They're saying the other side of the coin doesn't matter
14 because that was already resolved by the Federal Circuit,
09:32:42 15 and it wasn't.

16 And now we've got to consider the scope and content of
17 the written description from the perspective of a person of
18 ordinary skill in the art. The only evidence on that
19 subject comes from us, and it demonstrates that the claims
09:33:01 20 to the extent they're considered to be totally flat don't
21 correspond with the written description. The written
22 description requires something on the bottom of this tape.

23 So that, Your Honor, is our position on written
24 description. Unless you have any questions, I'm happy to
09:33:19 25 answer them; otherwise I'll turn, as you said, to the other

1 invalidity position in this case which has to do with the
2 anticipation based on prior art.

3 So --

4 THE COURT: Wait just a second.

09:33:32 5 MR. SHEIKH: I'm sorry. I'm sorry, Your
6 Honor.

7 THE COURT: Okay. Why don't you go on.

8 MR. SHEIKH: Thank you, Your Honor.

9 So turning to the issue the second invalidity position
09:34:32 10 in this case on our summary judgment motion, we've got --
11 I've identified three independent bases for invalidating all
12 the asserted claims of the '664 patent based on prior art,
13 and that consists of the Durastripe tape, the Dorenbusch
14 patent, and the Great Britain patent. And let me set the
09:35:02 15 stage for this --

16 THE COURT: Let me ask, the Great Britain
17 patent, was that ever mentioned in the pleadings before?

18 MR. SHEIKH: In the pleadings? I believe it
19 was, Your Honor. I believe in our -- and I will go back and
09:35:20 20 look at this and confirm it for Your Honor, but I believe
21 that in our answer and counterclaims, Your Honor -- they've
22 been amended -- we had identified prior art including
23 Dorenbusch and Durastripe, and I think among the prior art
24 identified I believe the Great Britain patent is identified.
09:35:40 25 It's certainly was put into our invalidity contentions under

1 local patent rules. Clearly it was part of that, and it's
2 been part of the expert reports.

3 If you're asking about the pleadings and if you mean
4 the counterclaims, I believe it was, but I can go back and
09:35:59 5 confirm that, if that's important. But it was --

6 THE COURT: I'm not sure whether it varies
7 much from the Dorenbusch. Why don't you go ahead with
8 regard to either the Durastripe issue or the Dorenbusch
9 issue.

09:36:23 10 MR. SHEIKH: Yes, Your Honor, I'll focus on
11 those two.

12 THE COURT: So those deal -- is the principal
13 element of disagreement on that is whether the Durastripe
14 lateral edge anticipated the plaintiff's patent?

09:36:46 15 MR. SHEIKH: Well, I think to be honest with
16 you, Your Honor, I think the only dispute -- I think from
17 the matter of claim coverage with -- and you're talking
18 about Durastripe, that there is no dispute. There is no
19 dispute. That -- we identified a --

09:37:09 20 THE COURT: Is Durastripe the one you contend
21 they admitted was similar, but is Durastripe the prior
22 implementation that involves whether it was within the
23 period before the patent application?

24 MR. SHEIKH: Yes, Your Honor. Durastripe is a
09:37:33 25 physical tape. It's a physical tape that we've identified

1 and that physical tape is called Durastripe. It was a
2 product. Nobody disputes, nobody in this case has ever
3 disputed that Durastripe is prior art. Everybody -- and in
4 fact on that basis, throughout the case, we've identified
09:37:55 5 requests for admissions in our submissions that most
6 of -- just from the perspective of Durastripe, elements were
7 flat out admitted. There's no dispute.

8 And the belt and suspenders to that, we've identified
9 in our claim chart that Your Honor asked us to submit, we've
09:38:16 10 shown where it is. There's been no dispute.

11 What has happened is in our summary judgment motion we
12 pointed to a Durastripe tape, and for the first time in this
13 case, three years, they made the assertion, well, wait a
14 second, that they haven't identified a dated Durastripe
09:38:41 15 tape. That was out of left field, because nobody had
16 disputed that Durastripe -- and we identified this tape at
17 the beginning of the lawsuit.

18 So that is the only dispute, if there is one, and I
19 contend there isn't one, and I can explain in a minute.

09:38:57 20 But as far as how the claims apply to that tape that
21 we've identified that we put -- this is the tape, Your
22 Honor, if you'll remember, when you reconvened us on May 25,
23 I believe it was, you asked us to pull out the answer and
24 counterclaims.

09:39:17 25 And you wanted to refresh your memory about the case,

1 and you had directed the parties and, said, well here in the
2 answer and counterclaims there's a Durastripe tape, and is
3 that what one of the things you contend invalidates the
4 patent. We confirmed that for you "yes." Well, that
09:39:33 5 Durastripe tape that was there that you identified, that's
6 what we identified in our summary judgment motion.

7 There is no evidence in this summary judgment record
8 that that tape lacks any element of any of the asserted
9 patent claims. What the defendants -- I'm sorry -- what the
09:39:51 10 plaintiffs have done, the only thing they have done is, one,
11 they've said, well, you've got to identify a dated version
12 of that, which we have; and second, they have engaged in
13 this misdirection which has happened throughout the case,
14 and I want to clear it up here now, Your Honor. They -- and
09:40:10 15 they continued in their submission Friday, this rebuttal
16 report they submitted.

17 All they have told Your Honor is, Your Honor, look at
18 the dyes and the process used to make Durastripe.

19 Well, that's different from my viewpoint. Those are
09:40:26 20 different processes. Look how the dyes are different, look
21 how the processes are different. That's not true.

22 But more importantly, more fundamentally, it doesn't
23 matter, Your Honor. This patent is directed to a physical
24 object, the tape. The only issue before Your Honor on
09:40:42 25 summary judgment is whether we've identified a prior art

1 piece of tape, Durastripe, that has all the elements.

2 The misdirection about what the dyes are, what the
3 process is, that may be useful for other aspects of the
4 case. It doesn't matter. We need to look at the physical
09:41:00 5 tape and does it include each and every element of the
6 asserted claims.

7 And Your Honor, if you look at the summary judgment
8 record with respect to that piece was tape you are not going
9 to find anything from them that contradicts what we put in
09:41:15 10 our claim chart. Each and every element is there, every
11 one. They have said in their filing, I did notice, and
12 something to the effect that they have disputed that the
13 lateral edge isn't there. There's a request for admissions
14 on this very topic where they admitted that it's there.

09:41:35 15 So I don't quite understand where that's coming from.
16 The request for admission is, "Admit that Durastripe tape
17 had a body that had first and second lateral edge portions
18 disposed in a longitudinal direction." "Response: Admit."
19 That's Exhibit 13 at page ID3878.

09:41:58 20 Couldn't be clearer. So for them to come in now and
21 throw that into their supplemental brief isn't going to save
22 them. That's admitted, and moreover, there's just nothing.
23 The only thing they've been able to do on that tape is to
24 talk about the dyes and the process.

09:42:22 25 We've also, with respect to its prior art status, Your

1 Honor, we have a declaration of Tom Goecke that we include
2 in the summary judgment record where he says, he points out
3 its prior art. That's consistent with everything that
4 happened in the case, they never contested it.

09:42:41 5 When we saw that in their filing we wanted to leave no
6 stone unturned here. We've come too far. Your Honor has
7 come too far. We've put too much into this case. So we
8 submitted -- we went out and got the declarations of
9 Mr. Nye, Mr. McHale, to just put that whole idea to rest,
09:43:01 10 leave no doubt.

11 We didn't need to do that, and frankly, Your
12 Honor -- but under Rule 56(e) that's exactly why we have
13 that rule, is to avoid that, because we can't have a trial
14 where this issue really is in dispute. So that's what we
09:43:20 15 did there.

16 So unless Your Honor has some questions about
17 DuraStripe --

18 THE COURT: Let's let counsel for the
19 plaintiff respond.

09:43:29 20 MR. SHEIKH: Yes, Your Honor.

21 THE COURT: I didn't draw this out from the
22 defense to any major degree, but how do you distinguish the
23 Dorenbusch patent, this kind of athletic tape that goes
24 into -- that predated your patent.

09:44:01 25 MR. WEBER: Well, again --

1 THE COURT: It had a flat bottom, right?

2 MR. WEBER: Dorenbusch does indicate that it
3 has a flat bottom, although the flat bottom has a crosshatch
4 pattern on it, or whatever, to keep it from sliding --

09:44:32 5 THE COURT: Yeah, but that's not part
6 of -- that's not part of the claim limitation, right?

7 MR. WEBER: No, no. I was just stating what
8 Dorenbusch had.

9 THE COURT: Okay. So it's got a flat bottom
09:44:45 10 and it's got kind of an edge then. How do you distinguish
11 the Dorenbusch patent -- how does it not anticipate the
12 '664?

13 MR. WEBER: Well, for a number of reasons.
14 All of the claims of the '664 patent require that the upper
09:45:11 15 surface of each lateral edge portion comprises an extension
16 of the upper surface of the body. That's not present in
17 Dorenbusch.

18 Dorenbusch -- pardon?

19 THE COURT: Well, can you -- the edge portion,
09:45:29 20 it's part of the same general surface.

21 MR. WEBER: But -- I'm sorry, Your Honor.

22 THE COURT: Doesn't it have basically a flat
23 top and then it gets towards the edge and then has a
24 bevelled edge going down to the floor?

09:45:55 25 MR. WEBER: It does have that, but it doesn't

1 have the upper surface of the lateral edge portion
2 comprising an extension of the upper surface of the body.
3 That feature isn't present. Those are sharply cut,
4 sharply-cut edge portions. You look at them, they come
09:46:14 5 down, it isn't an extension.

6 You're talking about looking at an appliqué or
7 whatever you're going to put on the floor that has a top
8 surface, a bottom surface, and uniquely-defined edge
9 portions which are not extensions of the upper surface of
09:46:37 10 the body. Every word in the claim is important. They're
11 claiming this as an anticipation, and that's simply not the
12 case, at least for there. You just look at the title of the
13 invention. The title is "Temporary rearrangeable marking
14 system." We are not talking about or claiming a temporary
09:47:05 15 rearrangeable marking system.

16 THE COURT: But that's not one of the elements
17 that the circuit had, is it?

18 MR. WEBER: Yes. It's supposed to be adhered
19 to the floor to limit lifting and that. That's a limitation
09:47:23 20 of the claim. And yet these here are intended to be easily
21 lifted, taken away, put down the next time you have a
22 practice, or whatever. You know, that's not -- that doesn't
23 satisfy that claim language.

24 You wouldn't look -- a person skilled in the art would
09:47:51 25 not look to Dorenbusch for assistance in designing a marking

1 tape for an industrial floor that's going to resist lifting
2 that's going to be adhesively adhered, and the adhesive
3 for -- as Dorenbusch discloses is an option. You know, you
4 may need it, and not to prevent or to limit lifting from the
09:48:20 5 floor, but to prevent it from -- if I might -- prevent it
6 from sliding. That's what Dorenbusch is talking about.

7 So you know, there's certainly a difference. In fact,
8 they're saying it's for the nonslip characteristic. It's an
9 adhesive with a low degree of adhesion so as to not make it
09:48:45 10 difficult for the spot markers removal from the surface,
11 which in fact is the antithesis of the --

12 THE COURT: Take a look at the Dorenbusch
13 patent at column 3, line 15 and 16. Does it teach the thin
14 layer of adhesive can be applied to the underside of the
09:49:27 15 maker?

16 MR. WEBER: Yes. I just said that. And the
17 adhesive enhances the spot marker's surface nonslip
18 characteristic. An adhesive with a low degree of adhesion
19 is used so as not to unduly make difficult the spot marker's
09:49:45 20 removal from the surface.

21 That's the antithesis of what we want.

22 THE COURT: They talked in the Dorenbusch
23 about applying an adhesive to the bottom of the tape, right?

24 MR. WEBER: Again, yes.

09:50:14 25 THE COURT: Well, how does that not anticipate

1 the adhesive that you're speaking about?

2 MR. WEBER: It does not limit unintentional
3 lifting of the floor, marking tape from the floor. They
4 come around and lift this stuff up and take it away. They
09:50:39 5 express --

6 THE COURT: Your tape, isn't one of the
7 selling points that you can move these around and you
8 can -- they're not permanent and you can also pick them up?

9 MR. WEBER: Not our tape.

09:50:57 10 THE COURT: Well, one says permanent.

11 MR. WEBER: No.

12 THE COURT: Once it's applied does it remain
13 there forever?

14 MR. WEBER: Well, they've brought in tape that
09:51:08 15 is the accused tape that they say has been down on a floor
16 for 20 years. I would say that that's pretty permanent.

17 It can be removed, but it's not removed and reused --

18 THE COURT: Well, how -- the Dorenbusch, how
19 is that significantly different -- or how does Dorenbusch
09:51:31 20 not anticipate --

21 MR. WEBER: It's significantly --

22 THE COURT: -- if both of them can be removed
23 even with differing levels of effort required to do the
24 removal?

09:51:42 25 MR. WEBER: You need to read the claim. I

1 don't mean "you," I apologize for that. You, a corporate
2 "you," a person needs to read the claim in its full context,
3 but --

4 THE COURT: Well, let's go -- the claim itself
09:52:07 5 describes each of the first and second lateral edge portions
6 having a maximum height that is less than the width
7 and -- and I think this is where you're going -- an adhesive
8 securing the lower surface of the body to the upper-most
9 surface of the floor to establish a boundary.

09:52:28 10 MR. WEBER: No. I was over at claim 11, Your
11 Honor. Down near the bottom, the first and second junctions
12 disposed on the upper-most surface of the floor such that
13 the floor marking tape limits unintentional lifting of the
14 floor marking tape from the floor.

09:52:48 15 THE COURT: I still am kind of lost how that
16 differs from Dorenbusch's suggestion that you might use
17 adhesive.

18 MR. WEBER: Because you have to read what
19 Dorenbusch says. Its for is to keep it from slipping.

09:53:08 20 THE COURT: I thought the bottom of Dorenbusch
21 was textured to try to keep the slipping to a minimum.

22 MR. WEBER: That's right. And then it says in
23 the part you had me read, enhances the spot marker's surface
24 nonslip characteristic. The adhesive enhances the spot
09:53:30 25 marker's surface nonslip characteristic. That's what

1 they're talking about. It doesn't anticipate this. It
2 doesn't satisfy, you know, that requirement of the claim.

3 THE COURT: Well, if Dorenbusch tells users
4 that they can make the tape less likely to be picked
09:54:02 5 up -- or to be, you know, interfered with by putting some
6 adhesive on the bottom of it, does that anticipate the
7 adhesive that you suggested with the '664?

8 MR. WEBER: Does that anticipate -- no, it
9 doesn't anticipate it. And again, you have to read the
09:54:36 10 entire claim language. They're talking about slipping and
11 easily removable, and then you can use it again tomorrow and
12 put it in a different places. That isn't what this
13 invention is about. It isn't about what the accused product
14 is about. If they had wanted to use this type of an
09:55:04 15 adhesive on their product we wouldn't be here, Your Honor.

16 THE COURT: Okay. Let's go to the -- to the
17 Durastripe argument. How are they different?

18 MR. WEBER: Well they're totally different,
19 Your Honor. You know, Mr. Lowe used to sell the Durastripe
09:55:25 20 product. We actually have unused samples of the Durastripe
21 product from the time in interest to today, and they don't
22 have tapered edges. They have edges that are either
23 bullnose, in other words, they come down very much
24 vertically, they round off and come down very much
09:55:51 25 vertically, or they're duckbilled, which means that the top

1 comes down a little and the bottom comes up a little, but it
2 doesn't lie on the floor, it doesn't prevent the Towmotors
3 or skids or pallets or anything from lifting.

4 THE COURT: Let me deal with the second part
09:56:11 5 of that. The duckbill, so did the -- the Durastripe was
6 intended to be a floor marking tape, right?

7 MR. WEBER: Yes.

8 THE COURT: So if it -- and so even if it's
9 duckbilled, would the underside of the duckbill, if there
09:56:47 10 were such a duckbill, wouldn't that actually adhere to the
11 floor anyway?

12 MR. WEBER: It might adhere to the floor until
13 a pallet came across it and that duckbill is lifted up.
14 That's exactly what this invention was about, and that's
09:57:04 15 what the claims say. It's down on the floor. It comes
16 down. The junctions hit on the floor. You can take the
17 product that -- the Durastripe product that we still have or
18 that Mr. Lowe still has, you can put it down and you can
19 take a credit card out of your wallet and slide it under,
09:57:30 20 and that certainly doesn't satisfy this claim.

21 And another very important, very important aspect
22 here, Your Honor, is that not only do we have the product, a
23 contemporaneously product which they apparently don't have,
24 and they purportedly didn't have it 12 years ago when we
09:57:53 25 were involved in a suit with them then when they were suing

1 us, but we have it. We have that product.

2 And we also note their patent, Mr. Goecke's patent on
3 his product, and his patent does not show a tape with any
4 tapered edges. Although he said he's always made his tape
09:58:16 5 with tapered edges, it doesn't show, mention, describe,
6 suggest, even hint to the desirability of having tapered
7 edges. And that was on the product that he was then
8 selling, this Durastripe product.

9 And as I'm sure Your Honor knows from patent cases,
09:58:40 10 you're required to show your best mode and preferred
11 embodiment or the best mode of your invention in your
12 patent. His patent is devoid of any suggestion of that.
13 And --

14 THE COURT: Was the Durastripe under a patent?

09:58:59 15 MR. WEBER: I'm sorry?

16 THE COURT: You're confusing me with some
17 discussion of a 12-year-old patent that predates. Is that
18 the patent that was used for the Durastripe?

19 MR. WEBER: Yes -- right. It's the patent
09:59:13 20 that, remember, that was marked on the Durastripe product.
21 The patent number that's marked on the Durastripe product
22 does not have tapered edges. That patent would have been
23 unenforceable from the get-go because it didn't disclose or
24 treat or address the best mode, if in fact, if in fact they
09:59:37 25 had tapered edges.

1 But if Your Honor, if Your Honor would indulge me, if
2 you would look at the expert report of Jim Frankland, the
3 supplemental expert report that -- rebuttal expert report, I
4 should say, that was recently filed, you know, he has
09:59:57 5 described it absolutely correctly; that what they were
6 attempting to make was a tape with bullnose on both sides
7 because the bullnose is vertical, just like what they show
8 in their patent. They didn't have -- they didn't have this,
9 they didn't advertise it, they didn't promote it, and they
10:00:19 10 didn't warranty for it. They wouldn't warranty for it.

11 THE COURT: I'm still kind of -- they've shown
12 this die that doesn't show a bullnose, but their suggestion
13 is there may be some variation among manufacturing, and as
14 you exclude this materials maybe some had more of a
10:00:43 15 bullnose, maybe some had less; but that the issue I thought
16 they were arguing was that the test on prior art was whether
17 there was any out in the commercial market that had edges
18 that were -- that read on; just that you have, not that
19 everyone had, only that at least someone in the commercial
10:01:16 20 market did.

21 MR. WEBER: And you're right, Your Honor. I
22 have apologize. You're right, and we're saying there
23 weren't any.

24 And Your Honor, if I might, just to step back a little
10:01:29 25 bit --

1 THE COURT: Let me go back. How would your
2 expert know, he can make a comparison, you know, for among
3 two different samples, but how would he have knowledge to
4 testify as to what all the other manufacturing runs were?

10:01:54 5 MR. WEBER: Because he can tell by looking at
6 the die. And it's very interesting that they're saying now
7 don't look at the die, don't look behind the curtain, don't
8 look at the die. And if you'll remember, they brought a die
9 to our first meeting with the Court. And they showed the
10:02:14 10 Court that die, and that die, according to our expert, when
11 run will because the tapered edges are cantilevered out,
12 they're hot, they're molten, and they're unsupported because
13 their cantilever will fold down as they exit the die and
14 they begin to cool and shrink, they'll fold down, and
10:02:41 15 they'll make the vertical edge that is shown in their
16 patent.

17 And if they had one that had a tapered edge that met
18 our claims out of Durastripe that would have been a real
19 anomaly. That would have been a real anomaly.

10:03:01 20 THE COURT: And then finally, with regard to
21 the embodiment, do you have any more argument with regard to
22 the underside as to whether you sufficiently described that
23 and whether the specifications, whether the specifications
24 you gave sufficiently read on the claim you're making?

10:03:26 25 MR. WEBER: Yeah. It's -- I want to be

1 careful how I say this, and I mean that. But once again,
2 we're addressing things as though they're in a claim that
3 aren't in a claim.

4 The claim doesn't talk about whether the bottom is
10:03:47 5 flat -- I mean whether the bottom is continuous,
6 discontinuous, whether it has shoulders, whether it has a
7 recess, or whether it's just totally flat. The claims don't
8 talk about that.

9 But the specification, as Mr. Haas, their expert,
10:04:04 10 aptly noted in his expert report --

11 THE COURT: Let me -- your argument is fairly
12 confusing. Do your specifications point out an underside
13 able to absorb the adhesive material, basically a channel
14 under the tape?

10:04:33 15 MR. WEBER: "Absorb the adhesive material."
16 I'm not --

17 THE COURT: Confine or hold the adhesive
18 material under the tape.

19 MR. WEBER: One embodiment does, Your Honor.
10:04:47 20 One embodiment.

21 THE COURT: Okay. So almost all of the
22 drawings show that?

23 MR. WEBER: The drawings but not the claims,
24 Your Honor. And --

10:05:00 25 THE COURT: Let me -- and I think I understand

1 what you're saying. The claims I thought, and the defendant
2 can correct me if I am wrong, I thought their argument was
3 that claims can be interpreted broader than specifications,
4 but that because of the embodiment requirement that there
10:05:32 5 still needs to be a confluence between the specifications
6 and the claims so that somebody would know how to create the
7 patented article.

8 MR. SHEIKH: If you're asking me, Your
9 Honor -- this is Dave Sheikh with the defendants.

10:05:54 10 If you are asking did you get that right, you did, and
11 Mr. Weber is making the argument for us. He said, yes, the
12 specification says what Your Honor says it does, that
13 there's got to be something on the bottom, but the claims
14 don't. That's the problem. That's why the claims are
10:06:11 15 invalid. That's exactly right.

16 MR. WEBER: It doesn't say --

17 THE COURT: Mr. Weber, if the claim is broader
18 than the specifications, how does somebody know how to
19 embody the patent? Do they follow the specifications or do
10:06:39 20 they follow the claim?

21 MR. WEBER: The claims are a part -- the
22 original claims are part of the specification, Your Honor,
23 and they follow, they follow either. But someone, as the
24 Federal Circuit noted I think five or six times in its
10:07:00 25 decision, the specification describes various embodiments of

1 the tape, several without shoulders. So it's telling the
2 person skilled in the art reading, if you want to make one
3 without shoulders, make it without shoulders. If you want
4 one with a recess to cabin the adhesive, as the Court has
10:07:27 5 stated, make one with a recess that will cabin. But --

6 THE COURT: Where did they say that about the
7 underside recess?

8 MR. WEBER: The underside what?

9 THE COURT: Where did the Federal Circuit say
10:07:40 10 that about the underside recess?

11 MR. WEBER: Well, at document 110, page
12 ID4911, they said, unquote, unlike the '664 patent claims,
13 the '290 patent claims expressly recite that the claim has
14 shoulders and the recess. It says "the patent claims."

10:08:11 15 The specification describes various embodiments of the
16 tape, several without shoulders. Document 110, ID4912, it
17 says, the specification goes on to describe additional
18 embodiments or configurations of tape, several without
19 shoulders.

10:08:41 20 It's saying the specification is doing this, as is
21 clear from the claim language and the specification. That's
22 where I started off and Your Honor stopped me, even Haas
23 says there's five embodiments. There's five embodiments in
24 this patent, and he goes through and talks about them.

10:09:04 25 A person skilled in the art, in fact, even the patent

1 says one of the features is that you have a tapered edge.
2 Another feature says that you have shoulders and a recess.
3 If you're interested in keeping it -- having a nice little
4 ramp down to the floor you use the tapered edges. If you
10:09:26 5 want to cabin the adhesive you use the shoulders and the
6 recess.

7 A person skilled in the art, as the Federal Circuit
8 aptly noted, would know that you don't have to use all of
9 them, because he talks about five different embodiments.

10:09:46 10 THE COURT: Where is the specification --
11 remind me, because I'm sure you know -- where is the
12 specification that says that you can have an underside
13 without any cavity of any type. Which specification says
14 that or which drawing?

10:10:18 15 MR. WEBER: Well, the claim says it. It's not
16 saying --

17 THE COURT: Is there any specification that
18 indicates that there is at least one version where there is
19 no distinction between the underside of the middle area and
10:10:46 20 the floor?

21 MR. WEBER: Well, I know that Mr. Haas saw it.
22 Let me see. Their expert saw it --

23 THE COURT: We're going to pull this to a
24 close. Why don't you take a look.

10:11:03 25 Do you have any rebuttal argument, Mr. Sheikh, on

1 either on the earlier argued Dorenbusch or the Durastripe?

2 MR. WEBER: If I might just for a minute, Your
3 Honor.

4 If you just look at the brief summary of the
10:11:24 5 invention, it talks about -- this is the first paragraph
6 under that in one configuration, and it talks about what's
7 there. And in the next paragraph, and another --

8 THE COURT: Which line are you referring to?

9 MR. WEBER: I'm sorry, Your Honor. Column 1,
10:11:43 10 we're down about halfway. See "brief summary of the
11 invention"?

12 THE COURT: Yes, I see that.

13 MR. WEBER: All right. So it sets out
14 different configurations. Those are oftentimes referred to
10:11:56 15 as embodiments. And in fact, I think Mr. Haas or Dr. Haas,
16 their expert, referred to them as embodiments. He saw
17 different embodiments. And some of those embodiments are,
18 you know, had to have the -- well, I mean, take a look a
19 minute here: The lower surface adapted to face the floor.
10:12:23 20 Pair lateral edges disposed in longitudinal direction, and
21 adhesive disposed adjacent to lower surface of the body, and
22 the body have --

23 THE COURT: Using the term "adjacent" to the
24 lower surface, is that under the lower surface?

10:12:39 25 MR. WEBER: Well, I would imagine --

1 THE COURT: The summary of the invention talks
2 about adjacent to the lower surface. Does "adjacent" mean
3 under the lower surface or adjacent to the part of the lower
4 surface that's --

10:13:04 5 MR. WEBER: I think -- it's on the lower
6 surface. And then the next embodiment, notice that that
7 first paragraph didn't have -- didn't describe lateral edges
8 except that it has lateral edges. But in the next --

9 THE COURT: Let me bring you back, because
10:13:34 10 this -- I'm losing your argument. In the "brief summary of
11 the invention," what part of that brief summary says that
12 adhesive would be put on the lower surface of the tape
13 without having any kind of structure to block the adhesive
14 from squirting out the edge of the lower surface?

10:14:09 15 MR. WEBER: Well, the second paragraph
16 effectively says that.

17 THE COURT: The one that begins, "In another
18 configuration"?

19 MR. WEBER: Right.

10:14:30 20 The next one, the fourth one, doesn't -- it just talks
21 about the body having a glossy surface, and it talks about
22 that as being another configuration of the invention.

23 THE COURT: Yeah, but do any of those say
24 anything about just simply putting the adhesive on the
10:14:54 25 bottom of the tape without some kind of barrier to stop the

1 adhesive from squirting out?

2 MR. WEBER: No. Normally you don't say about
3 what you exclude, Your Honor. You don't say that in a
4 patent, why you exclude.

10:15:11 5 What we're saying is normal tape, normal tape just
6 like the tape shown in ShieldMark's original patent, has a
7 substrate and an adhesive on the bottom of it. You know,
8 that's not rocket science. You don't have to teach that to
9 a routineer in the art. That's what the Federal Circuit
10:15:38 10 said, you know.

11 I don't want to go on.

12 THE COURT: Mr. Sheikh, do you have any
13 concluding argument?

14 MR. SHEIKH: I do, Your Honor. I will try to
10:15:51 15 be brief. There were just some points on all three of these
16 issues I can highlight.

17 Let me quickly, on the written description, I think
18 Your Honor has it. I can tell from the questions that
19 you're focusing on the right thing, and look, the answer is
10:16:04 20 there's nothing. As Mr. Haas said, and he said and his
21 conclusion was, to a person of skill in the art that the
22 scope of the teaching of that written description is that
23 you must have some structure on the bottom. That was his
24 conclusion. That is the only evidence of someone skilled in
10:16:20 25 the art on that topic, and that's the written description.

1 Let me address Dorenbusch. I can really quickly do
2 that, because again that anticipates, that is unquestionably
3 prior art. The document, the four corners of the document
4 make a disclosure, and you saw from the briefing that very
10:16:44 5 little is contested.

6 THE COURT: What about he does contest whether
7 it was intended to be a permanent tape or one that would be
8 more easily removed.

9 MR. SHEIKH: Correct, Your Honor. And let me
10:16:58 10 point out that the patent, the Lowe patent itself recognizes
11 that the advantage of the tape is -- one of the benefits of
12 the patent tape is it can be lifted when a space is
13 reconfigured without excessive damage to the floor. That's
14 in the patent at column 1, lines 5 to 27. They talk about
10:17:20 15 advantages of the tapes like the invention.

16 Second, I will note that the claims don't say that the
17 tape is permanent or stays on the floor. They say it stays
18 down unless it's unintentional, unintentionally taken off
19 the floor. That's exactly what Dorenbusch is. It is made
10:17:41 20 so it stays on the floor when you want it to be, and when
21 you don't want it to be it can be lifted intentionally. You
22 can intentionally pull it off the floor.

23 The patent says, Dorenbusch says, it readily remains
24 in place without being dislodged. It can be readily removed
10:18:00 25 when no longer needed. It results lateral forces to remain

1 in place during use. And it is a sufficient bulk and weight
2 to remain in place once properly positioned.

3 And Your Honor has also identified, which is something
4 that I identified, that the Dorenbusch patent expressly
10:18:22 5 teaches the use of an adhesive at the bottom. So this is at
6 column 1, lines 44 to 47; column 1, line 55, 58; and column
7 2, 55 to 60 of Dorenbusch, all teaches this notion that it
8 stays in place unless it's intentionally lifted.

9 I'll also want to address one point that, first of
10:18:41 10 all, to anticipate something would be either express or
11 inherent, express or inherent; the only evidence of someone
12 skilled in the art says it's there, and that comes from us.
13 Everything is there.

14 Second, that he made the note that no -- Mr. Weber
10:18:54 15 argued that a person skilled in the art wouldn't turn to
16 Dorenbusch, which is incorrect. First of all, Mr. Haas says
17 a person of skill in the art would; but second, if you look
18 at the Lowe patent itself, if you look at what Mr. Lowe
19 cited to the Patent Office during prosecution he cited U.S.
10:19:12 20 Patent 5,196,255 to Cohen, which is directed to an extruded
21 plastic slat, and during prosecution a U.S. patent
22 application 2009-0263610 to Yee for a glue-laminated bamboo
23 furniture.

24 So he himself recognized that someone skilled in the
10:19:35 25 art would look to something other than just strictly a tape.

1 He identified --

2 THE COURT: Do you have any concluding comment
3 or response on the Durastripe issue?

4 MR. SHEIKH: Yes, Your Honor. First of all --

10:19:50 5 THE COURT: If it's a bull end does it
6 anticipate the '664 lateral edges?

7 MR. SHEIKH: Well, I don't know what bull -- I
8 don't know what that means. Nobody in this case except
9 possibly the plaintiffs know what it means.

10:20:05 10 I want to bring it back to what matters, Your Honor.
11 You heard nothing from Mr. Weber today and you heard nothing
12 in their briefs about that tape that we identified in our
13 Patent Office. I don't know if it's -- if they want to
14 call it bullnose, if they want to call it bullnose or
10:20:21 15 duckbill, call it any name they want, that tape has each and
16 every element. They have not disputed that.

17 THE COURT: They're saying that their
18 invention, that it sounds like they're arguing that their
19 invention's salient feature was the kind of the
10:20:41 20 gently-sloping edge and the ability not to get pushed up by
21 the pallets or traffic over the edge of it.

22 MR. SHEIKH: Right. And in our summary
23 judgment filing, our summary judgment filing, and you look
24 at what we filed in our claim chart that Your Honor asked us
10:21:02 25 to submit that identifies evidence, that element is there

1 front and center. It's present in the tape we identified,
2 and they have not disputed that.

3 What you heard, what you keep hearing from them, it
4 is, oh, look at Mr. Goecke's patent, which was directed to
10:21:23 5 like entirely different features. Look at the dies, look at
6 the molds.

7 Judge, they're telling you, we don't want you to look
8 at the actual product we identified in our motion. Prior
9 art, Durastripe tape, that has exactly what you just asked
10:21:39 10 me about, and all the other elements.

11 THE COURT: Okay.

12 MR. SHEIKH: And that is the end of the case,
13 Your Honor.

14 THE COURT: Okay. Let me --

10:21:48 15 MR. WEBER: Might I, Your Honor?

16 THE COURT: Let me ask the parties' input on
17 kind of a timing issue.

18 We hope to turn around decisions on this relatively
19 quickly. If the plaintiff doesn't have standing the case
10:22:18 20 goes away, but there is this separate invalidity argument.

21 If the plaintiff doesn't have standing in this case,
22 what's the plaintiff's position as to, and the defense
23 position, relative to whether one decision should as an
24 alternative ground deal with the invalidity? Because if the
10:22:51 25 plaintiff doesn't have standing, the case I assume gets

1 thrown out, but then there would be an opinion that the '664
2 is invalid.

3 MR. SHEIKH: Your Honor --

4 THE COURT: To some degree that would be *dicta*
10:23:14 5 or an advisory opinion.

6 MR. WEBER: We would be acceptable -- we would
7 find that acceptable, Your Honor, to do standing first. We
8 think we're right on it, but we -- you know, I understand
9 where Your Honor is coming from.

10:23:39 10 THE COURT: What about the defense? Because
11 I'm not sure myself which way to go on that, but --

12 MR. SHEIKH: Yes, Your Honor.

13 THE COURT: Because you've briefed and argued
14 both issues, and I believe we are pretty closely ready to
10:23:58 15 make a decision on both, but if there wasn't standing to
16 continue the lawsuit then --

17 MR. SHEIKH: Yes, Your Honor.

18 THE COURT: -- I'm not sure what impact any
19 judgment on validity would be.

10:24:15 20 MR. SHEIKH: Right. I understand the issue
21 before the Court because standing is a gatekeeping issue,
22 and -- but I think in this situation we'd be open if Your
23 Honor is contemplating this, I think you have to rule on
24 standing first. It's the gatekeeping. You have to make a
10:24:33 25 decision on that, and we think that the case should be over

1 and ended based on that ruling.

2 But we would not object if Your Honor wanted to then
3 kind of provisionally go to the substance, if Your Honor
4 concluded that would be appropriate. You know we would be
10:24:52 5 open to that.

6 I think that's all I can say. The standing is a
7 jurisdictional matter, jurisdiction issue, and so that's
8 going to be addressed first, and we think we've made clear
9 that this case is over because of that. But if Your Honor
10:25:09 10 were to address that, the substance, we would be open to
11 having that ruling.

12 THE COURT: Well, I'm not certain myself,
13 because I thought I would ask for the parties' respective
14 positions on that. I'm not sure how we'll deal with it one
10:25:26 15 way or the other. It may be that the case survives and
16 we'll deal with the validity issue, or if the case goes out
17 on standing I may or may not deal with the validity issue.

18 Let me thank everybody for the argument today.

19 MR. WEBER: Might I add one thing, Your Honor,
10:25:51 20 in response?

21 THE COURT: Go ahead.

22 MR. WEBER: Just with respect to Dorenbusch,
23 because I sort of thought we shifted gears too soon there,
24 Dorenbusch does not address the height and width of the
10:26:05 25 lateral edge portion relationship which is in every claim in

1 the patent, both independent claims -- well, at least
2 independent claims 1 and 11, and the claims dependent from
3 them doesn't address that, doesn't show that. And most
4 importantly, it doesn't satisfy that, so it cannot
10:26:27 5 anticipate it.

6 THE COURT: Okay. I'm not sure that succeeds.
7 I've forgotten the exact percentages, but I thought it
8 talked about a range between 30 and 60 degrees.

9 MR. SHEIKH: Your Honor, this is Dave Sheikh.
10:26:49 10 I wanted to raise two points if I could really
11 quickly --

12 THE COURT: We're going to bring this to a
13 close. If you want to quickly comment on that issue, but
14 we're not going to go back and forth.

10:27:00 15 MR. SHEIKH: Right. My other issue has
16 something to do with more procedural or timing, scheduling.
17 The issue on Dorenbusch I want to point, out you're
18 absolutely right that the patent expressly says that the
19 bevel is about 29 degrees. That is the same exact -- that's
10:27:17 20 in the range of exactly what they accused of infringement.
21 I don't see how Mr. Weber, how they can argue --

22 THE COURT: I had seen that before. I'm not
23 sure.

24 MR. SHEIKH: And Your Honor, the last issue
10:27:30 25 with your indulgence I wanted to raise is one of timing. We

1 wanted to raise this, the notion.

2 Now we're on a schedule and we have a trial date I
3 think for September 19. And given these issues that have
4 been raised, your standing which is subject matter
10:27:46 5 jurisdiction, and the issues, kind of many issues on
6 invalidity, we want to make a request -- this is something
7 we raised before -- that the Court continue the trial date.
8 And the reason is, the main reason --

9 THE COURT: What's the plaintiff's position on
10:28:03 10 moving it beyond September, move it perhaps to October. We
11 anticipate getting a decision out without any firm
12 commitment but we turn decisions out as relatively quickly.
13 But what's your position for the plaintiff on continuing the
14 trial date so both parties don't need to absorb a lot of
10:28:30 15 preparation expenses that may be well spent but may also be
16 wasted?

17 MR. WEBER: I haven't discussed that with my
18 client, Your Honor. I would like to --

19 THE COURT: Why don't you speak, and if both
10:28:47 20 parties can confer among themselves, especially if there is
21 agreement to push back to avoid those expenses to suggest
22 some trial dates when you both may be available, say in
23 October or early November. So if you can, come up with a
24 couple of suggested weeks if it does get continued. And if
10:29:14 25 you're unable to get to an agreement on that, rather than do

1 this orally, I'd ask defendant to file a written motion.

2 MR. SHEIKH: Yes, Your Honor. We appreciate
3 that.

4 THE COURT: Okay.

10:29:29 5 MR. SHEIKH: And I want to know one thing so
6 it's clear here. I also personally on September 19th have a
7 conflict. I do, and I don't want to spring that on
8 Mr. Weber or the Court. That goes into it, but our
9 fundamental reason is for what you said. There shouldn't be
10:29:48 10 potentially unnecessary --

11 THE COURT: Well, the basic question:
12 Marriage, divorce, or childbirth?

13 Okay. We don't ask for an answer.

14 MR. SHEIKH: I can explain it to the extent
10:30:08 15 necessary, but the primary reason --

16 THE COURT: It's not necessary. We don't
17 really even want to know. But please confer among
18 yourselves, and then we'll take it from there.

19 Why don't you bump everybody out, and Nate, if you can
10:30:24 20 stay in, we'll stand adjourned on this.

21 - - - - -

22 (Proceedings adjourned at 10:30 a.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/ Heidi Blueskye Geizer September 20, 2022

Heidi Blueskye Geizer
Official Court Reporter

Date